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New South Wales. Laws, statutes, etc. Civil procedure law.

# ARBITRATION ACT, 1892,

WITH THE

RULES OF 24th MARCH, 1893,

FORMS AND NOTES OF CASES.

BY

*JAMES MORIARTY,*

OF THE

Middle Temple, Barrister-at-Law.

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To the

HONOURABLE PETER FAUCETT,

Who, for over twenty-two years, was a Judge of the Supreme  
Court in the Colony of New South Wales.

A Judge courteous, wise, and learned.

MAY 8 1917

# The Arbitration Act.



(BY THE SAME AUTHOR.)

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IN PREPARATION.

# THE LAW & PRACTICE

OF

## NEW SOUTH WALES

ON

Appeals from Justices' Orders and Convictions,  
and by Special Case

Appeals from all inferior Courts to the Supreme  
Court

AND ON

Appeals to the Privy Council,

Criminal Information and Writs of Habeas Corpus,  
Mandamus, Prohibition and Quo Warranto,

WITH

COPIOUS NOTES AND AN APPENDIX CONTAINING THE  
ACTS AND RULES,

BY

## JAMES MORIARTY,

OF THE

MIDDLE TEMPLE, BARRISTER-AT-LAW.

## PREFACE.

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THE law relating to arbitration in the Colony of New South Wales is contained in three Acts of Parliament, 22 Vict. No. 18, 51 Vict. No. 37, and the 55 Vict. No. 32. The Act of 1892, while repealing the 31 Vict. No. 15, is on the same lines as the 52 & 53 Vict. c. 49, which passed into law in England in 1889. The law in England previous to the 52 & 53 Vict. c. 49 was regulated (apart from particular statutes) by the 9 Will. III. c. 15 as amended by 3 & 4 Will. IV. c. 42 and the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 3-17, and further amended by the Judicature Acts, 1873 and 1884, and the Rules of the Supreme Court, 1883. The law in New South Wales was regulated by the 31 Vict. No. 15 (now repealed), the Public Works Act, 1888, and the District Courts Act, 1858.

The Arbitration Act, 1892, may be divided into references by consent and compulsory references. As to the former, there can arise little difficulty if the parties be in earnest in their willingness to arbitrate, and independent persons—not partisans—be nominated as arbitrators. As to the latter, the Judge has power under s. 12 to order the whole matter, or any question of fact arising therein, to be tried before an arbitrator agreed on by the parties or before a referee appointed by the Court or Judge for the purpose. As to remuneration in compulsory references, the Judge (sub-s. 3 of s. 13) shall determine the remuneration to be paid to any referee or arbitrator; in reference by consent the Act is silent as to fees or payments, but Rules 7, 10, 11 and 12 provide a means which may work satisfactorily in practice.

Before proceeding to arbitration it will be advisable to arrange the fees payable to the arbitrator, and, in case of any difference, that the matter of claim be taxed by the Prothonotary, as there

is judicial authority so ancient as 1820 [*Goodman v. Sayers*, Jacob & Walker's Cases in Chancery, vol. 2] for saying "that the very definition of a good award is that it gives dissatisfaction to both parties."

In the following pages I have endeavoured to lay before the Profession the decisions in England, New South Wales and Victoria, and I hope while this book may prove useful that the Arbitration Act will be generally availed of in suitable cases.

JAMES MORIARTY.

CHAMBERS,

12 Wentworth Court,

Sydney.

*May, 1893.*

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# ARBITRATION ACT, 1892.

55 VICT. No. XXXII.

An Act to amend and consolidate the law relating to Arbitration. [Assented to 31st March, 1892.]

**W**HEREAS it is expedient to amend and Preamble.  
consolidate the law relating to Arbitration:  
Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

## *References by Consent out of Court.*

1. A submission (a), unless a contrary intention is expressed therein, shall be irrevocable (b), except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court.

Submission to be irrevocable, and to have effect as an order of Court.

(a) A submission is defined by s. 27—"A written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not." As to imperfect submissions. [*Mason v. Haddan ; Randell, Saunders & Co. v. Thompson ;*

55, Vict. No. 32.

*Walters v. Morgan ; Rainforth v. Hamer ; Campbell v. Vickery ; Deutsche, Springsteffe, Gassellschaft v. Briscoe.*] In the *Caerleon Tinplate Company v. Hughes and another* (v. 7 Times Law Reports p. 619), similar sections (Nos. 1 and 27) were considered. Mr. Justice *Denman*: "Section 27 expressly provided that a submission to arbitration should be taken to mean an agreement in writing—that is an agreement in writing signed by either or both the parties or by an agent on behalf of both. . . The sold note contained no arbitration clause; it was therefore no submission to arbitration which could be enforced within the Act." (*In re Lewis*, 1 Q.B.D. 724, cited and approved.) [*Goodson v. Brooke.*]

Where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and one of the parties refuses to appoint an arbitrator, the Court has no power, either under or apart from the Arbitration Act, to order him to do so.

*In re* an intended arbitration between *Smith & Service* and *Nelson & Sons*, L.R. Q.B.D. 25, p. 545, [where an order of the Queen's Bench Division [Lord *Coleridge*, C.J., and *Wills*, J.], affirming an order in Chambers that the appellants should within seven days appoint an arbitrator under an arbitration clause in a charter party, was successfully appealed from] *Bowen*, L.J.: "I may remark that the word 'submission' and the words 'revocation of submission' are words which have been used with some inexactitude both in the cases and in the text books. There may be an agreement to refer generally without naming the arbitrators; such an agreement was always irrevocable, and an action would always lie for its breach although the Court could not

compel either of the parties to proceed under it. 55 Vict. No. 32. There may be an agreement to clothe a particular arbitrator with authority, and if one of the parties revoked that particular arbitrator's authority and refused to submit to him, he could not be compelled to proceed. In such a case, though not with exactitude, one might probably talk of revocation of the submission and of the submission as revocable, although it was in truth a revocation of the authority of that arbitrator; the party does not revoke the agreement to refer, but revokes the authority which he has given to the arbitrator. But so far as the latter words of the clause are concerned, 'and shall have the same effect in all respects as if it had been made an order of the Court,' the meaning must be that the submission, whether it be a general agreement to refer or not, is to have effect as would have been given to it before the statute by an act of parties making it a rule of Court. But making a submission a rule of Court never gave the power of compelling a party to go on and present himself before some arbitrator when the arbitrators were not named."

As to power of attaching under old law, see judgment of *Willes, J.*, in *Re Rouse & Meier*.

When submission must be under seal. [*Hutchinson v. Whitfield.*]

As to submission by corporation when not under seal. [*Faviell v. Eastern Counties Railway Co.*]

By a company limited under Companies Act. [*Gale v. Wingello Coal Mining Co., Ltd.*]

See s. 68, 37 Vic. No. 19, and *In re Trades and Industrial Hall*.

55 Vict. No. 32.

Prior to the passing of this Act, if the agreement had not nominated an arbitrator or referee, it did not amount to a submission. [*Hickey v. Q.S.I. Co.*]

If arbitrator not nominated by parties submission would be valid, but party must nominate before making an application under s. 3.

As to nomination, see ss. 4 and 5.

An action lies for breach of agreement to refer as to amount of damages. [*Brunsdon v. Haines Local Board; Livingston v. Ralli.*]

As to submissions by a partner [*Thomas v. Ather-ton*]; by a married woman [*Strachan v. Dougall; Palliser v. Gurney*]; by an infant [*Henery v. Henery; Ebbett's case; Coxhead v. Mullis*]; by an attorney [*Favrell v. Eastern Counties Ry. Co.; Swinfen v. Swinfen; Strauss v. Francis*]; by an executor or administrator as to admission of assets [*Worthington v. Barlow*].

(b) *Application to Revoke.*

The application must be made before award. [*Phipps v. Ingram.*]

(1) DEATH, (2) MARRIAGE, (3) BANKRUPTCY.

(1) *Death.*

The death of a party, generally speaking, operates as a revocation of an arbitrator's authority. If submission has provided in express terms for that event, an award made under such a rule after the death of a party in ordinary cases would clearly be valid. [*Per Curiam, Tyler v. Jones.*]

The remedy upon the testators undertaking to 55 Vict. No. 32. perform the award is by action against the executors. [*Tyler v. Jones.*]

As to action by the executors. [See *Bowker v. Evans.*]

A party may agree to bind himself to an arbitration, but not those who are to succeed him. [*President of Orphan Board v. Van Reenan.*]

See ss. 108, 109, 110, 112 C.L.P. Act, 1853.

### (2) *Marriage.*

The marriage of a female party before award is a countermand of arbitrators' authority. [*Marsh v. Wood.*] If others be joined with her as co-plaintiffs or co-defendants, her marriage avoids submission as to all of them; however, after award an action may be brought against her and her husband for breach of agreement to abide by award. [See s. 114 C.L.P.A. 1853.]

### (3) *Bankruptcy.*

Bankruptcy does not amount to an absolute revocation. If the bankruptcy of one party prevents the arbitration from bringing the disputes to a final end, the other party may lawfully stop the arbitration. [*Bayley, J., in Marsh v. Wood.*]

In *Ebsworth v. Hickey*, p. 334, *Stephen*, Ch. J., says:—"If bankruptcy does not operate to revoke a reference, *à priori* a statutory assignment does not." *Wise, J.*, adds:—"In case of bankruptcy the assignees may repudiate the submission if they like; but if they go on without repudiating they are bound." See s. 115 C.L.P.A. 1853. [*Milnes v. Robinson.*]

*The grounds of the application.*

- (a) On the same grounds that a Court of Equity would rescind a contract for sale or purchase of goods or real estate.
- (b) In *East & West Indian Dock Co.*, appellants, and *Kirk & Randall*, respondents.

The House of Lords held, reversing the decisions of the Court of Appeal and the Divisional Court, that the Court had power to give leave to revoke the submission where it appeared that the arbitrator was going wrong in point of law, even in a matter within its jurisdiction. [L.R. 12 Appeal Cases, p. 738.]

- (c) Where it was established to the satisfaction of the Court that the arbitrator was unfit for the discharge of his duties, that from his conduct or expressed opinions he was likely to deviate from the course which justice demands. [*Harvey v. Shelton* ; *Kimberley v. Dick* ; *Malmesbury Ry. Co. v. Budd* ; *Beddow v. Beddow*.]

As to when the Court will exercise this power. [See *James v. James & Bendall*.]

- (d) Where the subject matter is clearly illegal.

*When the application will not be granted.*

- (a) The Court will require a very strong case made out. [*James v. Attwood* ; *Scott v. Van Sandan* ; *James v. James & Bendall*.]
- (b) The party applying must establish the misconduct of the parties, or that the arbitrator is not

correctly pursuing the provisions of the sub- 55 Vict. No. 32.  
mission, or is behaving amiss. [*In re Woodcroft*  
*and Jones.*]

In *Christie v. Noble, Jessel, M.R.* [Reported note  
in *Piercy v. Young*, 14 L.R. Ch. D. 203.]

“Although a particular submission might be re-  
voked, a partner could no more revoke a general  
agreement to refer than he could revoke any other  
contract in the partnership articles.”

As to time within which application must be made,  
the rules contain no provision.

**2.** A submission, unless a contrary intention is Provisions  
implied in  
submissions.  
expressed therein, shall be deemed to include the  
provisions set forth in the First Schedule to this Act,  
so far as they are applicable to the reference under  
the submission.

#### PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

- (a) If no other mode of reference is provided, the  
reference shall be to a single arbitrator.
- (b) If the reference is to two arbitrators, the two  
arbitrators may appoint an umpire at any time  
within the period during which they have power  
to make an award.
- (c) The arbitrators shall make their award in writing  
within three months after entering on the  
reference, or after having been called on to act  
by notice in writing from any party to the sub-  
mission, or on or before any later day to which  
the arbitrators, by any writing signed by them,  
may from time to time enlarge the time for  
making the award.



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- (d) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.
- (e) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.
- (f) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.
- (g) The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.
- (h) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.\*

- (i) The costs of the reference and award shall be in the 55 Vict. No. 32. discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

“All matters in dispute between the parties” will include all disputes affecting their civil rights. [*Baker v. Townsend.*]

A submission in addition to foregoing implied conditions may with advantage contain some of the following :—

1. A recital of the differences referred.
2. That death, marriage, or bankruptcy, shall not be a revocation.
3. A power to proceed *ex parte* at discretion of the arbitrator. [Rule 3.]
4. A power to arbitrator to incur any necessary costs and expenses in the drafting or completing of the award.
5. That evidence taken by one arbitrator may be acted on by both or by umpire.
6. That umpire need not re-hear case unless requested.
7. That the award may be made within            months,  
and that it can be enforced within            days  
by either party.
8. That the arbitrator shall have power to employ an accountant to assist him, and in case of costs to direct at any time during the reference the taxation thereof by the Prothonotary.

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9 A provision for death of the arbitrator before award.

See Rules 1, 2, 3, 4, 8 and 15.

## ARBITRATION.

Power to stay proceedings where there is a submission.

3. If any party (1) to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through' or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance (2), and before delivering any pleadings or taking any other steps in the proceedings (3), apply to that Court to stay the proceedings, and that Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

(1) Instead of adopting this course a party may plead in bar the agreement to refer. In *Dawson v. Fitzgerald*, *Jessel*, M.R., says:—"I take the law as settled by the highest authority—the House of Lords. There are two cases where such a plea as the present is successful—*first*, where the action can only be brought for the sum named by the arbitrator; *secondly*, where it is agreed that no action shall be brought until there has been an arbitration, or that

arbitration shall be a condition precedent to a right of action. [See *Collins v. Locke*; *Vigney v. Bignold*.] 55 Vict. No. 32.

(2) The application is after an appearance has been entered in the Court in which the proceedings are pending, and to that Court; the affidavit of applicant must show that he was at all times ready and willing to do all things necessary to the proper conduct of the proceedings and his readiness and willingness to refer. [*Gillett v. Thornton*.]

(3) Before plea or any other step. [*West London Dairy Co. v. Abbott*; *Chappell v. North* (1891).]

The Court will inquire if any action of the party applying (in case it should not amount to the entry of a plea or answer), is a step *prima facie* inconsistent with willingness to adopt the submission. [*West London Dairy Co., Limited v. Abbott*.]

What is a step? [See *Musgrave v. Stevens*, W.N. (1881) p. 163; *Mulkern v. Doerks*, 53 L.J.Q.B. 526.]

The nomination of an arbitrator or application to the other side for extension of time to plead not a step. [*Stephen, J.*, in Chambers, on 25th Nov., 1892, in *Greta Collieries v. Wyndham*.]

If an application had been made to a Judge for extension of time to plead, would it not be a step in the proceedings?

Practice similar to that under s. 2 of 31 Vict. No. 15 now repealed.

The agreement to refer disputes to a foreign tribunal is within the section. [*Law v. Garrett*.]

The *onus* lies on plaintiff in the legal proceedings to satisfy the Court that there is sufficient reason

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for continuing the proceedings. [*Cook v. Catchpole ; Jessel, M.R., in Hodgson v. Passenger Ry. Co. ; Plews v. Baker.*]

It is not necessary for all the parties to join in the application to stay proceedings. [*Willesford v. Watson.*]

The question whether the matters in dispute are within the agreement or submission is one which the Court will decide and will not leave to the arbitrator. [*Piercy v. Young ; Turnock v. Sartoris (1890).*]

Where a question of law arises, and it is clear such a question was never intended to be submitted to a lay arbitrator, proceedings in equity will not be stayed. [*Alexander v. Campbell.*]

Where a question of law may be raised by defence, power of Court to order application to stand over until defence filed. [*In re Carlisle ; Clegg v. Clegg.*]

Where the arbitration clause did not cover the whole subject matter of the action, and it would be necessary to split up the dispute, application was refused. [*Turnock v. Sartoris.*]

In cases coming under the following headings the Court has declined to interfere.

- (a) Where the applicant has no equity. [*Sturgis & Another v. Lord Curzon ; Murray v. Cohen.*]
- (b) Where the submission is non-existing (*i.e.*, incapable of being carried into effect) and inoperative. [*Randell v. Thompson ; D.S.G. v. Briscoe.*]
- (c) If the Court be satisfied that the circumstances are so altered that justice cannot be done by carrying out the original submission. [*Hirsh v. Irm Thirn ; Davis v. Starr ; Campbell v. Vickery ;*

*Port Jackson Steamship Co. v. Newcastle Steamship Co.* 55 Vict. No. 32.

- (d) Where a question of fraud arises more fit for determination by a jury. [*Wallis v. Hirsh*; *The Birmingham and Staffordshire Gas Co. v. Ratcliffe*; *Hock v. Boor.*]
- (e) Where the person charged with the fraud desires an investigation before a public tribunal, the Court may allow the proceedings to continue. [*Cook v. Catchpole*; *Russell v. Russell.*]

In addition to granting a stay of the proceedings the Court may make any other necessary order. [*The Compagnie du Senegal v. Woods & Company.*]

In addition, a receiver may be appointed by the Court on the hearing of the application.

4. In any of the following cases:—

- (a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator:
- (b) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:
- (c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.

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- (d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy :

[*Trippel v. Eyre ; Reynolds v. Gray ; Oliver v. Collins.*]

Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Before an application be made under s. 3, it seems applicant should endeavour to get the other side to concur in the appointment, or in case of refusal serve a written notice.

#### FORM.

To

*In the matter of arbitration between*

I hereby give you notice in accordance with s. 4 of the Arbitration Act, 1892, that I require you (as the case may be) within 7 clear days after service of this notice, and in case you fail or neglect so to do I will apply to the Court or Judge to exercise the powers given by the aforesaid Act.

Dated.

[Signed]

As to service, see Rule 15.

*When the Court will not appoint an arbitrator.*

The submission was that each party should appoint an arbitrator if called on by the other to do so ; disputes arose and B. died ; A. then called on B.'s executors to appoint an arbitrator, which they refused to do. Held that the Court had no jurisdiction—the exercise of personal judgment had become impossible. [*In re arbitration between Percival and Others*, V. 3 Times Law Reports, 150.]

If the arbitrators do not agree on all points, the umpire they call in must decide on all. [*Wicks v. Cox*, 11 Jurist, 542.]

5. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

Power for parties in certain cases to supply vacancy.

- (a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place :
- (b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the



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reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court or a Judge may set aside any appointment made in pursuance of this section.

Power of Court to set aside appointment : when it may be exercised.

The Court will not act on mere suspicion [*Crossley v. Clay.*]

It will receive evidence of merits or demerits ; it will examine with the strictest care imputations of partiality, secret interest, bias, hostility. [*Pickering v. Cape Town Rail. Co. ; Malmesbury Railway Co. v. Budd ; Beddow v. Beddow ; Whitely v. Roberts* (1891).]

Powers of  
arbitrator.

6. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

- (a) To administer oaths (1) or to take the affirmations of the parties and witnesses appearing ; and
- (b) To state an award as to the whole or part thereof in the form of a special case (2) for the opinion of the Court ; and
- (c) To correct in an award any clerical mistake or error (3) arising from any accidental slip or omission.

*(a) Form of oath.*55 Vict. No. 32.

You shall make true answer to all such questions as shall be asked of you touching the matter in difference between the parties to this reference. So help you God.

The parties may waive taking evidence on oath. [*Wakefield v. Llanelly Railway and Dock Co.*]

If a submission provides for evidence on oath, affidavits cannot be read. [*Banks v. Banks.*]

Sec. 22 makes false swearing before arbitrators equal to crime of perjury. [See ss. 291 and 292, 46 Vict. No. 17.]

Arbitrators or an umpire have full power to regulate the course of procedure before them; they are bound to observe the ordinary rules which are laid down for the administration of justice, and if these rules have not been observed to the prejudice of either party a Court will set aside the award. [*Haigh v. Haigh; Whatley v. Morland.*]

*(b) Special case, how it ought to be stated.*

Every special case ought to be divided into paragraphs numbered consecutively, and ought to state concisely such facts and documents as may be necessary to enable the Court to decide the questions raised thereby.

The special case is merely auxiliary to the award. It enables the arbitrator in case of doubt to come to the Court for assistance and advice. It is a provision to assist the arbitrator to obtain the opinion of the Court for his own guidance in deciding the matters under consideration. [*Gumm v. Fowler.*]

B

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The case ought to set forth the facts found by the arbitrator and his inferences from them.

The power given to the arbitrator is permissive, not compulsory.

One word as to the inconvenience which it has been suggested might arise from holding parties conclusively bound by the decision of the arbitrator upon a nice and intricate question of law.

That inconvenience may always be obviated by introducing into the submission a clause enabling either party to call upon the arbitrator to reserve for the decision of the Court any question of law that may arise. [*Cockburn*, Ch. J., in *Hodgkinson v. Fernie*.]

If the arbitrator unreasonably refuses to state a case his action may amount to judicial misconduct, or misconduct in a legal sense.

Where the power is merely permissive in form (as in s. 6) and not compulsory, the Court, although considering the refusal captious and unreasonable and the decision wrong in law, refused to interfere. [*In re Bailey v. Harb.*]

See s. 16 as to further powers to state special case, p. 28.

See Rules 4, 6, 13.

(c) *Clerical mistake or error.*

Ought to receive a liberal construction as to amendment of the submission by the parties. [*Cudmore v. McPherson*; *Brooks v. McPherson*.]

If with the sanction of the Court. [*Tomkins v. Cunningham*.]

See s. 9, p. 20.

7. Any party to a submission may sue out a writ of subpoena *ad testificandum* (1), or a writ of subpoena *duces tecum* (2), but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action: Provided that every person whose attendance is so required shall be entitled to the like conduct money and payment for expenses as upon a trial in the Court.

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Witnesses may be summoned by subpoena.

Proviso.

See Rules 4 and 16.

(1) If a witness be guilty of contemptuous disregard, an attachment should be applied for.

An action on the case also lies. [*Maunsell v. Ainsworth.*]

(2) If the submission provides (expressly or by implication) for the attendance of the parties and the production of all books, accounts and papers before the arbitrator, and the arbitrator duly requires the attendance and production of any books and papers, in default, the Supreme Court will grant an attachment, the party has submitted to the discretion of the arbitrator the question what are the matters in difference and he must be concluded by his opinion. [*Arbuckle v. Price.*]

See s. 2 and *f* in First Schedule, p. 8, *ante*.

Notice of demand ought to be made in writing and sufficient time for attendance and production allowed.

See Rules 2 and 3.

8. The time for making an award may from time to time be enlarged by order of the Court or a Judge,

Power to enlarge time for making award.

55 Vict. No. 32. whether the time for making the award has expired or not.

See Rule 8.

When the Court will exercise the power. [See *Doe d. Mayo v. Carmell*; *Edwards v. Davies*; *Gaffney v. Killeen*; *Sahl v. MacDonnell*.]

Power to  
remit award.

9. (I) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

See Rules 13 and 14.

[*Sahl v. MacDonnell*.]

(II) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Rule 8.

“The Court is always very loth to set aside an award where the parties have chosen their own judges: if it is possible to uphold an award the Court will do so, and where there is any matter within the jurisdiction of the arbitrators left in doubt by the award the Court will send it back for reconsideration so that the rights of the parties may be determined by the judges chosen by them.” [C.J. *Darley* in *Re Trades and Industrial Hall*.]

The Court can exercise this power from time to time so long as the award remains defective.

As a general rule the Court will remit an award on the same grounds that it would formerly set it

aside. [*Bradley v. Phelps*; *Bury v. Dunn*; *Hodgkinson v. Fernie and another.*] 55 Vict. No. 32.

*Cases in which the award has been sent back.*

- (a) Where there has been an irregularity but no imputation on the conduct of the arbitrator. [*In re Peterson v. Ayre.*]
- (b) Where the arbitrator has declined to exercise his jurisdiction or to decide matters within the submission. [*Insull v. Morgan*; *Sahl v. MacDonnell*; *Brooker v. McPherson*; *Cudmore v. McPherson.*]
- (c) Where the arbitrator has been misled or has fallen into a manifest error. [*In re Armstrong & Culley.*]
- (d) In cases of surprise or discovery of new and material evidence. [*In re Huntley*; *In re Batty.*]

“On a motion to refer back an award, the Court may either refer all matters back or limit the reference to certain matters only.”

Where an order is made referring back the award for reconsideration, is the whole award suspended? [*Suttor v. Moore.*]

- (e) Where it appears on the face of the award or on paper forming part of the award (though this may be somewhat doubtful) that the arbitrator has mistaken the law. [*Williams, J., at p. 68, in Hodgkinson v. Fernie & Another.*]

10. (1) Where an arbitrator or umpire has mis- Power to set aside award.  
conducted himself, the Court may remove him.

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(II) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

As to liability of arbitrator in action for carelessness, negligence or unskilfulness if acting in good faith. [*Tharsis Sulphur and Copper Co., Limited, v. Loftus.*]

As to liability of arbitrator in an action against him for fraud, collusion, corruption or partiality. [*Pappa v. Rose ; Stevenson v. Watson ; Turner v. Goulden ; Ludbrook v. Barrett.*]

Every man who enters on a submission is at liberty to choose whom he thinks best for his arbitrator ; however, the Court will exercise the censorship of inquiring into his conduct, and will remove him if his expressions or conduct prove him unfit for the honest discharge of his duty. The arbitrator should endeavour to arrive at his conclusion upon the same rules and principles as the tribunal for which he is substituted. [*Per Turner, L.J., in Haigh v. Haigh.*]

Corruption, dishonesty, secret interest, perverseness, incapacity, irregularity or partiality will call for the action of the Court. [*Malmesbury Ry. Co. v. Budd ; Beddow v. Beddow.*]

*When the award may be set aside.*

As to what misconduct of arbitrator or umpire has been held sufficient to have award set aside. [*Parker v. Burroughs ; Earl v. Stocker ; In re Convella and Volkart (1888) ; Wright v. Howson, (1888).*]

(a) Moral misconduct, corruption, corrupt motive, or fraud. [*Moseley v. Simpson.*]

- (b) Judicial or legal misconduct, *i.e.*, where the arbitrator has acted contrary to natural justice, *e.g.*, proceeded in the absence of the parties, or refused to hear witnesses. [*In re Plews ; Gladwin v. Chilcote ; Scott v. Van Sandan ; Haigh v. Haigh ; Haggen v. Baker ; Re Mount Kembla Coal and Oil Co., Eady's arbitration.*] 55 Vict. No. 32.
- (c) Where the arbitrator has delegated his authority. [*Little v. Newton.*]
- (d) Failed to exercise his judgment. [*Whitmore v. Smith.*]
- (e) Award made by some in the absence of and without consulting the others. [*Re Beck v. Jackson.*]

If an umpire be called in, in the absence of any express condition in the submission, it will be his duty to adjudicate on the whole submission.

“If the arbitrators do not agree on all points, then by intendment of law the umpire they call in must decide on all.” [*Coleridge, J., in Wicks v. Cox.*]

An award by umpire and one arbitrator set aside. [*In re Templeman & Reed.*]

*When an award has been improperly procured.*

An award will be set aside or remitted back on the following grounds :—

- (a) When it exceeds the submission. [*Hutchinson v. Easton, Brett, M.R., p. 867 ; Sinidino v. Kitchen.*]
- (b) When it does not extend to all matters referred.



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- (c) Where it is uncertain, illegal, inconsistent, or unreasonable. [*In re Tribe v. Upperton* ; *In re Marshall v. Dresser.*]
- (d) Where it is not final. [*Samuel v. Cooper* ; *Tandy v. Tandy.*]
- (e) If there be fraud in the award where obtained by corruption or partiality on part of arbitrator. [*Tillenson v. Peat* ; *Morgan v. Mather* ; *In re Clout and Metro. Ry. Co.*]
- (f) If obtained by undue means or concealment of matters by which the arbitrator misled. [*Mitchell v. Harris* ; *Metcalfe v. Ives.*]
- (g) If the arbitrator has an interest in the claims of the parties to the submission and award. [*Elliott v. South Devon Rail. Co.* ; *Parker v. Burroughs* ; *Earl v. Stocker.*]

The conduct of the arbitrator may be so bad as to contaminate the award. [*Blennerhassett v. Day*, see p. 116 ; *Blanchard v. Sun Fire Office.*]

The cases show that the Judges have been unwilling to set aside the award in cases of surprise or false swearing.

If it be clear that a witness has committed perjury, the remedy is by prosecution and not by application to set aside the award. [*Scoles v. East London Water Works.*]

In *Goldsbrough & Co. v. McMahon* the Court refused to adjourn the argument of a new trial motion in order that a prosecution of certain witnesses for perjury in respect to the evidence given by them at the trial might be instituted.

It is a common law misdemeanour to prepare false 55 Vict. No. 32. evidence to be used in arbitration—an attempt to pervert the due course of law and justice. [*The Queen v. Veerness*, Crown Cases Reserved (1891).]

11. An award on a submission may, by leave of <sup>Enforcing</sup> the Court or a Judge, be enforced in the same manner <sup>award.</sup> as a judgment or order to the same effect.

See Rules 15 and 16.

How can a judgment be enforced.

By execution rules 398, 399, 400 of 1856.

Sect. 6, 37 Vict. No. 11.

No writ of attachment shall hereafter be issued to enforce payment of any money, costs or expenses, but writs of *fiery facias* or *capias ad satisfaciendum* and such other writs as may be necessary shall be issued.

Sect. 9, 31 Vict. No. 15, has been repealed.

### *References under Order of Court.*

12. In any cause or matter (other than a criminal <sup>Power to</sup> proceeding by the Crown) (1),— <sup>refer in</sup>  
certain cases.

(a) If all the parties interested who are not under disability consent: or,

(b) If the cause or matter requires any prolonged examination of documents (2) or any scientific or local investigation which cannot, in the opinion of a Court or a Judge, conveniently be made before a jury or conducted by the Court through its other ordinary officers; or,

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(c) If the question in dispute consists wholly or in part of matters of account :

the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before a referee appointed by the Court or a Judge for the purpose.

(1) Where a criminal information and an action were both referred . . . it was held that the findings were separable and the award good as to the costs of the action, though bad as to the costs of the information. [*Re Meaker and Brown.*]

Criminal matters, as to which the injured party has a remedy by action as well as by indictment, may be referred. [*Dobson v. Groves; Fallows v. Taylor.*]

(2) Prolonged examination of accounts.

In any case in which the Court would have jurisdiction to refer compulsorily a question of account, it has also jurisdiction so to refer all the other issues in the action. [*Ward v. Pilley, L.R. 5, Q.B.D. 427.*]

But where there is a preliminary question of liability to be decided before the question of account would arise, there is a compound question of liability and account, and the case should not be compulsorily referred.

The Court of Appeal disregards a practice which had grown up in the Exchequer. [*Clow v. Harper, L.R. 3 Ex. D. 198.*]

In *Sacker v. Ragozine, Denman, J.* :—"The case is so purely a matter of account that it is impossible to separate the issue of fraud."

*Pollock, B.* :—I think it is now generally understood that although actual fraud is involved, the section applies (the s. 57 Judc. Act, 1873, is similar in terms). 55 Vict. No. 32.

See s. 2 of 45 Vic. No. 26.

“The Judge before whom an action of compensation shall be tried shall in no case have power to direct a reference of the claim (under the Lands for Public Purposes Acquisition Act) to arbitration.”

**13.** (I) In all cases of reference under an order of the Court or a Judge in any cause or matter, the referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner as may be prescribed by Rules of Court, and subject thereto as the Court or a Judge may direct. Powers and remuneration of referees and arbitrators.

(II) The report or award of any referee or arbitrator on any such reference shall, unless set aside by the Court or a Judge, be equivalent to the verdict of a jury.

(III) The remuneration to be paid to any referee or arbitrator to whom any matter is referred under order of the Court or a Judge shall be determined by the Court or a Judge.

Rule 11.

As to appeals.

Order 59, R. 3, of the Supreme Court Rules, 1883, Jud. Act (England), is to the following effect:—

Where a compulsory reference to arbitration has been ordered, any party to such reference may appeal

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from the award or certificate of the arbitrator or referee upon any question of law; and on the application of any party the Court may set aside the award on any ground on which the Court may set aside the verdict of a jury.

Court to have powers as in references by consent.

14. The Court or a Judge shall, as to references under order of the Court or a Judge, have all the powers which are by this Act conferred on the Court or a Judge as to references by consent out of Court.

#### GENERAL.

Power to compel attendance of witness, and to order *habeas corpus* to issue.

15. (I) The Court or a Judge may order that a writ of subpoena *ad testificandum* or of subpoena *duces tecum* shall issue to compel the attendance before a referee, or before any arbitrator or umpire, of a witness wherever he may be within the jurisdiction.

(II) The Court or a Judge may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before a referee, or before any arbitrator or umpire.

Statement of case pending arbitration.

16. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

See Rules 5 and 6.

See *Bagaley v. Borthwick*, *Master v. Hamilton*, as to practice under C.L.P. Act and form of order made in later case.

17. The Judges of the Supreme Court, or any two of them, may, from time to time, make general rules and orders for carrying the purposes of this Act into effect.

55 Vict. No. 32.

Judges may make general rules and orders.

18. In all cases of reference to arbitration under any authority whatsoever it shall be lawful for the Court, or a Judge thereof, to make an order or issue a commission for the examination of any party to such reference, or any witnesses whose evidence, by reason of absence or intention to depart from the Colony, or illness, age, distance of residence, or other cause, would otherwise be liable to be lost, and to give all such directions as to the time, place and manner of examination and other matters connected therewith as such Court or Judge shall think fit. And every such order or commission may be made or issued in like manner as orders are made or commissions issued for the examination of witnesses in any cause in the said Court in its common law jurisdiction, or as near thereto as may be: Provided further that any person authorised to take the examination of parties or witnesses under any such order or commission shall take the evidence upon oath, or on affirmation in cases where affirmation is allowed by law to be administered in an action.

In all cases of arbitration orders may be made for obtaining evidence.

19. No person shall be compelled under any such order or by an arbitrator to answer any question he would not be compelled to answer at a trial.

Witnesses to have same protection as on trials.

20. All evidence taken under any such order or commission shall be received by the arbitrators, saving

Evidence taken under orders, &c., to be received.

55 Vict. No. 32. all just exceptions, in like manner as evidence taken under any order or commission made or issued by the Court or a Judge in a cause pending therein is received at the trial of such cause.

Costs.

21. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

[*Curzey v. Aitcheson ; Re Fearon and Flinn ; Rowcliffe v. Devon and Somerset Railway.*]

“ All costs and charges incidental to the reference and award,” held in *McGillivray v. Bibby and others*, 9 W.N., p. 51, to include costs between attorney and client.

Where award determined that each party was to pay his own costs of reference and half costs of award, it was held to mean each party had to pay his own counsel, solicitor, witnesses and so forth, viz., the costs of his conduct of his case, and each party has to pay half costs of what I will call the Court, i.e., of umpire, arbitrators, and award, and no more.

[*Crampton & Holt v. Ridley & Co.*, L.R. Q.B.D. 20, p. 48.]

Penalty for perjury.

22. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open Court, and may be dealt with, prosecuted and punished accordingly.

See ss. 191, 192, 46 Vict. No. 15.

**23.** This Act shall apply to any arbitration to which the Government of the Colony is a party.

**55 Vict. No. 32.**  
Government  
to be bound.

**24.** This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act.

Application  
of Act to  
references  
under  
statutory  
powers.

**25.** This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act.

Saving for  
pending  
arbitrations.

#### ARBITRATION.

**26.** (1) The enactment described in the Second Schedule to this Act is hereby repealed, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability.

(II) Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.



**55 Vict. No. 32.** **27.** In this Act, unless the contrary intention  
**Definitions.** appears,—

“Submission” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not ;

“Court” means the Supreme Court, or a Judge thereof ;

“Judge” means a Judge of the Supreme Court ;

“Rules of Court” means Rules made as herein-before provided.

**Short title.** **28.** This Act may be cited as the “*Arbitration Act, 1892.*”

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## SCHEDULE.

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### THE SECOND SCHEDULE.

#### ENACTMENT.

Year and Number of Act.	Title of Act.	Extent of Repeal.
31 Vic. No. 15...	An Act to make Arbitration more effectual ...	The whole Act.

# FORMS.

### Forms.

### PROCEEDINGS DURING THE REFERENCE.

*In the matter of*

I appoint the day of next for proceeding on the reference at the hour of at and I give notice that in case either party fail to attend without having previously shown to me good and sufficient cause, I shall, at the request of the other party, if present, go on with the reference.

**Dated**

$$T_o$$

*In the matter of* an arbitration

Sir,

I require you to produce before me on  
day of 189 on next at  
hour of forenoon at the following documents :—  
and all books and writings concerning the matter  
in dispute.

*Arbitrator.*

 $T_o$ 

*Notice to Parties of Award.*

Gentlemen,

We [or I] hereby give you notice that we [or I] have made and published our [or my] award in writing in the matter of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_.

Yours truly,

 $T_o$

Forms.*Suggested Form of Award.*

1. Whereas, &c. [*reciting either the submission or order under section 12.*]

2. Now I [*or we*], the said arbitrator, having duly considered the several matters, and weighed the proofs and evidence offered, do hereby make and publish my [*or our*] award concerning the matters referred to me in manner following :—

I award and adjudge that, &c. [*setting out each finding with particularity.*]

I award that the costs be paid by                      to                      .

*Or,*

That each party bear his own costs.

*Or,*

I assess the costs at £                      and that same be paid  
by                      or in such proportions, &c.

And I further award that there are no other matters in difference between the parties.

In witness whereof I [*or we*] have hereunto set my hand  
this                      day of                      in the year                      .

Signed and published the                      day of                      18  
in the presence of

# APPENDIX.

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## STATUTES RELATING TO ARBITRATION.

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### ARBITRATION UNDER THE DISTRICT COURT ACTS, 1858 TO 1884.

105. The Judge of any District Court may in any case with the consent of both parties to the suit order the same with or without other matters within the jurisdiction of the Court in dispute between such parties to be referred to arbitration to such person or persons and in such manner and on such terms as he shall think reasonable and just and such reference shall not be revocable by either party except by consent of the Judge and the arbitrator or arbitrators or umpire shall hear and determine the case and the award given by him or them shall be entered as the judgment in the cause and shall be as binding and effectual to all intents as if given by the Judge Provided that the Judge may if he think fit on application to him at the first Court held after the expiration of one week after the entry of such award set aside any such award so given as aforesaid or may refer such award back to the arbitrator arbitrators or umpire or may with the consent of both parties aforesaid revoke the reference or order another reference to be made in the manner aforesaid.

Power to  
refer to  
arbitration  
by consent.  
R. 153.  
F. 71.

Objection may be taken to the jurisdiction of the arbitrators on the ground that title to land is in question, during the progress of the reference, though the party objecting consented to the reference. *Knowles v. Holden*, 24 L.J. Ex. 223. No appeal lies from the refusal of a District Court Judge to set aside an award. *Mayer v. Farmer*, L.R. 3 Ex. D. 235.

S. 105.  
F. 71.

**153.** Where a plaint is entered the Judge may, with the consent of the parties, as well as in cases within the ordinary jurisdiction of the Court as in cases of agreement under section 9 of the Act, make an order for a reference under the provisions of section 105 of the Act, before, upon, or after the return day of the summons, and all the provisions in the said Act contained as to references shall apply to a reference under such an order: Provided that the same fees of Court, and fees to barristers and attorneys, and the like expenses to witnesses, shall be allowed and payable on an arbitration as are payable on a cause.

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*71. Order of Reference.*

S. 105.  
R. 153.

In the District Court of                      holden at  
Between A. B., Plaintiff, and C. D., Defendant.

(Seal.)

By the consent of the plaintiff and defendant, it is, at a Court holden this day, ordered that all matters in difference in this cause [and all other matters within the jurisdiction of this Court, in difference between the said parties] be referred to                      of                      whose certificate, to be made or given on or before the                      day of                      , 18                      , shall be entered as the judgment in this cause; and it is further

ordered, that the time for making or giving such certificate may be from time to time enlarged by the Judge of the Court, in his discretion, for such time as he shall, by indorsement to be by him made on this order, direct ; and that the said certificate, when made or given, may be referred back again to the said arbitrator at the like discretion of the said Judge without the further consent of the said parties ; and, in case either of the said parties shall neglect or refuse to attend any appointment to be made by the said arbitrator for proceeding under this order, after

days' notice thereof, in writing, shall have been given to him, by serving the same personally, or by leaving it at his last or usual place of abode, the said arbitrator shall be at liberty to proceed *ex parte* on the matters of the said reference, and his certificate shall be as valid as if both the said parties had duly attended before him. And it is further ordered, that the costs of the said reference shall be in the discretion of the arbitrator, and that the costs of the action shall abide the event ; and it is lastly ordered that the submission to arbitration shall not be revocable by either party.

Given under the Seal of the Court, this

day of , 18 .

By the Court,

Registrar of the Court.

37 Vict. No. 19. ARBITRATION UNDER THE INCORPORATION,  
REGULATION AND WINDING-UP TRADING  
COMPANIES AND OTHER ASSOCIATIONS [37  
VICTORIA No. 19].

Power for  
companies to  
refer matters  
to arbitration.

102. Any company under this Act may from time to time by writing under its common seal agree to refer and may refer to arbitration as hereinafter provided any existing or future difference question or other matter whatsoever in dispute between itself and any other company or person and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves or by the directors or other managing body of such companies and no party to any such agreement of reference shall have power to revoke the same without the consent in writing of the other party thereto nor shall the death of any party operate as a revocation thereof.

Mode of  
conducting  
arbitrations.

103. Whenever any dispute authorised by this Act to be referred to arbitration shall have been in manner hereinbefore provided agreed to be so referred and wherever any dispute directed by this Act to be so referred shall have arisen then except where and so far as the parties to such reference shall otherwise agree or provide such arbitration shall be conducted in the manner and shall have the effect hereinafter provided.

104. Unless both parties shall concur in the ap- 37 Vict. No. 19.  
pointment of a single arbitrator each party on the Appointment  
request of the other party shall nominate and appoint of arbitrators.  
an arbitrator to whom such dispute shall be referred  
and shall give notice in writing thereof to the other  
party and every appointment of an arbitrator shall be  
made on the part of the company under its common  
seal or under the hand of the manager or secretary or  
any two directors of the company or if there be a  
liquidator or liquidators of the company under the  
hand of the liquidator if only one or any two or more  
of the liquidators if more than one and on the part of  
any other party under the hand of such party or if  
such party be a corporation aggregate under the com-  
mon seal of such corporation and such appointment  
shall be delivered to the arbitrator and after any such  
appointment shall have been made neither party shall  
have power to revoke the same without the consent in  
writing of the other nor shall the death of any party  
operate as a revocation thereof and if for the space of  
twenty-one days after any such dispute shall have  
arisen and after a request in writing in which shall be  
stated the matter so required to be referred to arbitra-  
tion shall have been served by the one party on the  
other party to appoint an arbitrator such last-men-  
tioned party fail to appoint such arbitrator then upon  
such failure the party making the request and having  
himself appointed an arbitrator may appoint such  
arbitrator to act on behalf of both parties and such  
arbitrator may proceed alone to hear and determine  
the matters referred and his powers and authorities



37 Vict No. 19. shall be the same and his decision as effectual as if he had been the single arbitrator appointed by both parties.

Appointment  
of new  
arbitrators.

105. If before the matters so referred shall be determined any arbitrator appointed by either party die or become incapable the party by whom such arbitrator was appointed may nominate and appoint in manner herein provided for the appointment of an original arbitrator some other person to act in his place and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so the remaining or other arbitrator may proceed alone and his powers shall be as full and his decision as effectual as if he had been the single arbitrator appointed by both parties and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid.

Appointment  
of arbitrators  
to supply  
vacancies.

106. When more than one arbitrator shall have been appointed if before the matters referred to them are determined either of such arbitrators die or become incapable or refuse or for fourteen consecutive days neglect to act as arbitrator the party by whom he was appointed shall in manner herein provided for the appointment of an original arbitrator appoint an arbitrator in his place And where the party by which an arbitrator ought to be appointed in the place of the arbitrator so dying or becoming incapable or refusing or neglecting to act fails to make the appointment

Appointment  
of arbitrators  
by Registrar  
to supply  
vacancies.

within fourteen days after being thereunto requested 37 Vict. No. 19.  
 in writing by the other party then on the application  
 of such other party the Registrar may appoint an  
 arbitrator and the arbitrator so appointed by the  
 Registrar shall for the purposes of this Act be deemed  
 to be appointed by the party so failing.

107. If where a single arbitrator shall have been  
 appointed such arbitrator shall die or become incapable  
 or refuse or for fourteen consecutive days neglect to  
 act before he shall have made his award the matters  
 referred to him shall be determined by arbitration  
 under this Act in the same manner as if such arbi-  
 trator had not been appointed.

On death,  
&c., of single  
arbitrator  
matter to be  
commenced  
*de novo*.

108. Where more than one arbitrator shall have  
 been appointed such arbitrators shall before they enter  
 upon the matters referred to them nominate and  
 appoint by writing under their hands an impartial and  
 qualified person to be their umpire to decide on any  
 such matters on which they shall differ and if such  
 umpire shall die or become incapable to act or refuse  
 or for fourteen consecutive days neglect to act they  
 shall forthwith after such death refusal neglect or  
 disability appoint another impartial and qualified  
 person to be their umpire in his place.

Appointment  
of umpire.

109. If the arbitrators do not appoint an umpire  
 within seven days after the reference is made to the  
 arbitrators then on the application of either party to  
 the arbitration the Registrar may appoint an umpire

Appointment  
of umpire by  
Registrar.

37 Vict. No. 19. and the umpire so appointed shall for the purposes of this Act be deemed to be appointed by the arbitrators.

Appointment  
of umpire by  
Registrar to  
supply  
vacancy.

110. If the arbitrators fail to appoint a new umpire within seven days after notice in writing to them of the decease incapacity or failure to act of their former umpire then on the application of either party to the arbitration the Registrar may appoint an umpire and the umpire so appointed shall for the purposes of this Act be deemed to be appointed by the arbitrators so failing.

Succeeding  
arbitrators  
and umpires  
to have  
powers of  
predecessors.

111. Every arbitrator appointed in the place of a preceding arbitrator and every umpire appointed in the place of a preceding umpire shall respectively have the like powers and authorities as his respective predecessor.

Umpire may  
decide on  
arbitrators'  
default.

112. If where more than one arbitrator shall have been appointed and where neither of them shall refuse or neglect to act as aforesaid such arbitrators shall fail to make their award ready to be delivered to the parties within such time as they agree on or failing such agreement within thirty days next after the matters in difference are referred to such arbitrators or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

113. Before any arbitrator or umpire shall enter into the consideration of any matters referred to him he shall in the presence of a Justice make and subscribe the following declaration (that is to say)—

37 Vict. No. 19.

Solemn  
declaration of  
arbitrators or  
umpire.

“I A.B. do solemnly and sincerely declare that I will faithfully and honestly and to the best of my skill and ability hear and determine the matters referred to me under the provisions of ‘The Companies Act.’

A.

Made and subscribed in the  
presence of .”

114. The said arbitrators or their umpire may call for the production of any documents or evidence in the possession or power of either party which they or he may think necessary for determining the question in dispute and may examine the parties or their witnesses on oath and administer the oaths necessary for that purpose.

Production of  
documents.

115. The arbitrator and the arbitrators and the umpire respectively may proceed in the business of the reference in such manner as he and they respectively shall think fit.

Procedure in  
the arbitra-  
tion.

116. The arbitrator and the arbitrators and the umpire respectively may proceed in the absence of one of the parties in every case in which after giving notice in that behalf to the other party the arbitrator or the arbitrators or the umpire shall think fit so to proceed.

Arbitration  
may proceed  
*ex parte*.

37 Vict. No. 19.

Several  
awards may  
be made.

117. The arbitrator and the arbitrators and the umpire respectively may if he and they respectively think fit make several awards each on part of the matters referred instead of one award on all the matters referred and every such award on part of the matters shall for such time as shall be stated in the award the same being such as shall have been specified in the agreement for arbitration or in the event of no time having been so specified for any time which the arbitrator may be legally entitled to fix be binding as to all the matters to which it extends and as if the matters awarded on were all the matters referred and that notwithstanding the other matters or any of them be not then or thereafter awarded on.

Costs of  
arbitration  
and award.

118. The costs of and attending the arbitration and the award shall be in the discretion of the arbitrator and the arbitrators and the umpire respectively.

Payment of  
costs.

119. If and so far as the award does not otherwise determine the costs of and attending the arbitration and the award shall be borne and paid by the parties in equal shares and in other respects the parties shall bear their own respective costs.

Awards made  
in due time  
to bind all  
parties.

120. Every award of the arbitrator or of the arbitrators or of the umpire if made in writing under his or their respective hand or hands and ready to be delivered to the parties within such time as they agree on or failing such agreement within thirty days next after the matters in difference are referred to the arbitrator or the arbitrators or the umpire (as the case

may be) or within such extended time or times (if any) 37 Vict. No. 19. as shall have been appointed for that purpose by the arbitrator or the arbitrators or the umpire respectively by writing under his or their respective hand or hands shall be binding and conclusive on all the parties to the reference.

121. Except only so far as the parties bound by any award in accordance with this Act from time to time otherwise agree all things by every award in accordance with this Act lawfully required to be done omitted or suffered shall be done omitted or suffered accordingly. Awards to be obeyed.

122. Full effect shall be given by all Courts according to their respective jurisdiction and by the parties respectively and otherwise to all agreements references arbitrations and awards in accordance with this Act and the performance or observance thereof by any company or corporation aggregate party thereto may by the Supreme Court when such Court thinks fit be compelled by distress infinite on the property of such companies or corporations respectively or by any other process against such companies or corporations respectively or their respective property that the Court or any Judge thereof shall direct and when requisite frame for the purpose and by any other party by the mode and process of the Court by which the performance or observance of awards is enforced in ordinary cases of arbitration. Agreements, arbitrations and awards to have effect.

**37 Vict. No. 19.**

Submission  
may be made  
a rule of  
Court.

**123.** Every submission to arbitration under the provisions of this Act may be made a rule of the Supreme Court on the application of either of the parties and the Court may remit the whole or any of the matters to the arbitrator or arbitrators or umpire with any directions the Court may think fit.

Not to be set  
aside for  
matter of  
form.

**124.** No award made with respect to any question or dispute referred to arbitration under the provisions of this Act shall be set aside or be deemed invalid for irregularity or error in matter of form.

Matters not  
specially  
provided for  
to be dealt  
with under  
the general  
law of  
arbitration.

**125.** In matters not otherwise provided for by this Act the laws statutes and practice for the time being in force with respect to ordinary cases of arbitration shall so far as the same are applicable and can be applied extend and apply to all arbitrations under the provisions of this Act.

## 51 VICT. NO. 37.

51 Vict. No. 37.

An Act to provide for the constitution of an authority to investigate and report upon proposals for Public Works, &c., passed on 5th June, 1888.

As to compulsory arbitration, s. 2, 45 Vict. No. 26.

An Act to amend the Lands for Public Purposes Acquisition Act, s. 2. The Judge before whom an action for compensation shall be tried shall in no case have power to direct a reference of the claim to arbitration.

19. The Governor may direct that any land required, in his opinion, for any authorised work may be acquired, either by taking the same under the "Lands for Public Purposes Acquisition Act," as adopted by this Act, or under the provisions contained in Part III. hereof. Thereupon, subject to the provisions of this Act, the land so required may be taken or acquired in the manner directed, and the compensation for such land shall be ascertained and dealt with in all respects pursuant to the said Acts as so adopted, or the said Part, as the case may be.

As to taking of lands after resolution.

24. For the purpose of ascertaining the purchase money or compensation to be paid by the constructing authority regard shall in every case after the passing of this Act be had by the magistrates, arbitrators, surveyors, valuers, or jury (as the case may be), not only to the value of the land to be purchased or taken,

General provision as to compensation for land howsoever taken or acquired.



51 Vict. No. 37, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from other lands of such owner or otherwise injuriously affecting such other lands by the exercise of any statutory powers by such authority; and they shall assess the same according to what they shall find to have been the value of such lands estate or interest at the time notice was given of such lands being required or having been taken. Provided always that the said magistrates, arbitrators, surveyors, valuers, and jury in ascertaining such purchase money or compensation shall take into consideration and give effect to by way of set-off or abatement any enhancement in the value of any land belonging to such owner adjoining the land taken or severed therefrom by the construction of the authorised work. But in no case shall this proviso operate so as to require any payment to be made by such owner to the constructing authority in consideration of such enhancement of value as aforesaid.

Compensation where land alienated by the Crown when taken, &c., for Railway or Tramway.

**25.** Notwithstanding anything in the last preceding section, the compensation to be paid for and in respect of any land acquired or taken for railway or tramway purposes under this Act, at any time within five years from the time when such land was alienated in fee by the Crown, whether absolutely or conditionally, shall be a sum of money, for each acre or portion of an acre of such land, equal to the amount of purchase money paid per acre by the grantee, or to the amount of deposit per acre paid by the conditional

purchaser for such land (as the case may be), together <sup>51 Vict. No. 37.</sup> with a sum not exceeding one hundred per centum on the amount of such purchase money or deposit; and, in addition thereto, the value of any improvements, of whatever value the same may be, then being upon such land, such value, together with compensation for damage if any by severance to be determined under the provisions of this Act.

**34.** In the exercise of the powers granted by this Act, the constructing authority and all other persons shall do as little damage as possible; and, if required, full satisfaction shall be made in manner herein provided, to all persons interested in any lands or hereditaments which shall have been taken, used, injured or prejudicially affected, for all damages sustained by them by reason of the exercise of such powers. <sup>As to damages. 22 Vict. No. 19, s. 10.</sup>

**36. (v)** The purchase money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity and not having power to sell or convey such lands except under the provisions of this Act, and the compensation to be paid for any permanent damage or injury to any such lands shall not (except where the same shall have been determined by a surveyor appointed under the provisions hereinafter contained), be less than shall be determined by two Justices or by arbitrators appointed in the manner hereinafter provided. <sup>Amount of compensation to be ascertained by arbitration in case of parties under disability. 22 Vict. No. 19, s. 19.</sup>

51 Vict. No. 37.

If parties fail to treat, or in case of dispute, compensation to be settled as after mentioned.

8 Vict.

c. 18, s. 21.

22 Vict.

No. 19, s. 24.

**39.** If, for twenty-one days after the service of such notice, any such party shall

- (I) Omit to state the particulars of his claim in respect of any such land or to treat with the constructing authority in respect thereof; or
- (II) Fail to agree with the constructing authority as to the amount of the compensation to be paid by the constructing authority, for the interest in such lands belonging to such party or which he is by this Act enabled to sell; or for any damage that may be sustained by him by reason of the execution of the authorised work;—

The amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation.

But the owner or party claiming compensation shall not be at liberty to institute any proceeding for the recovery of his claim until after the expiration of fourteen days from the delivery of the particulars required by this Act to be furnished to him. Provided that if no claim be made within two years after such notice as aforesaid by the party entitled to make such claim, the same shall be deemed to have been waived and abandoned.

How disputes as to compensation to be settled.

8 Vict.

c. 18, s. 22.

22 Vict.

No. 19, s. 25.

**40.** If no agreement be come to between the constructing authority and the owners of, or parties by this Act enabled to sell and convey or release, any lands taken or required for any authorised work, or

injuriously affected by the exercise of any of the powers hereby granted, or any interest in such lands, as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, the compensation claimed shall be settled (I) by two Justices where such claim shall not exceed one hundred pounds, (II) by arbitrators as hereinafter provided where such claim shall exceed one hundred pounds.

41. Any Justice may, upon the application of either party, with respect to any question of disputed compensation by this Act authorised to be settled by two Justices, summon the other party to appear before two Justices, at a time and place to be named in the summons; and, upon the appearance of such parties or, in the absence of any of them, upon proof of due service of the summons, such Justices may hear and determine such question, and for that purpose examine such parties or any of them and their witnesses upon oath. The costs of every such inquiry shall be in the discretion of such Justices, and they shall settle the amount thereof. Provided always that, if the amount awarded by the Justices shall be one-third less than the amount claimed, the owner of the land or person claiming compensation shall pay to the constructing authority the costs of and occasioned by the inquiry, unless the constructing authority shall have offered a less amount than the sum awarded.

Method of proceeding before Justices for settling disputes as to compensation  
8 Vict. c. 18, s. 24.  
22 Vict. No. 19, s. 26.

42. (I) When any question of disputed compensation or any dispute or other matter authorised or directed by this Act to be settled by arbitration shall have

Appointment of arbitrators.  
8 Vict. c. 18, s. 25.  
22 Vict. No. 19, s. 27.

51 Vict. No. 37. arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator to whom such dispute or other matter shall be referred.

(II) Every appointment of an arbitrator shall be made, on the part of the constructing authority under his hand and official seal, and on the part of any other party under the hand of such party, or if such party be a corporation, under the common seal of such corporation.

(III) Such appointment shall be delivered to the arbitrator or arbitrators and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made ; and, after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party to such submission operate as a revocation thereof.

(IV) If, after any such dispute or other matter shall have arisen, and after a request in writing setting forth the matter so required to be referred to arbitration shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail within fourteen days to appoint such arbitrator, then, upon such failure, the party making the request and having himself appointed an arbitrator may appoint such arbitrator to act on behalf of both parties ; and such arbitrator may proceed to hear and determine the matters in dispute, and in such

case, except as hereinafter provided, the award or 51 Vict. No. 37.  
determination of such single arbitrator shall be final  
and conclusive.

**43.** If, before the matter so referred shall be Vacancy of arbitrator to be supplied.  
determined, any arbitrator appointed by either party 8 Vict. c. 18, s. 26.  
die, or become incapable to act as arbitrator, or refuse, 22 Vict. No. 19, s. 28.  
or for fourteen days neglect to act as arbitrator, the  
party by whom such arbitrator was appointed may  
nominate and appoint in writing some other person to  
act in his place. And if, for the space of seven days  
after notice in writing from the other party for that  
purpose, he fail to do so, the remaining or other  
arbitrator may proceed alone; and every arbitrator so  
to be substituted as aforesaid shall have the powers  
and authorities of the former arbitrator at the time of  
such death, refusal, neglect, or disability as aforesaid.

**44.** Where more than one arbitrator shall have Appointment of umpire.  
been appointed the arbitrators shall, before they enter 8 Vict. c. 18, s. 27.  
upon the matters referred to them, nominate and 22 Vict. No. 19, s. 29.  
appoint by writing under their hands an umpire to  
decide any matters on which they shall differ, or which  
shall be referred to him. If such umpire shall die or  
become incapable to act, or refuse, or for seven days  
neglect to act after being called upon to do so by the  
arbitrators, they shall forthwith, after such death,  
incapacity, refusal, or neglect, appoint another umpire  
in his place. The decision of every such umpire on  
the matters so referred to him shall, except as herein-  
after provided, be final.

51 Vict. No. 37.

One of the Judges of the Supreme Court to appoint umpire on neglect.

8 Vict. c. 18, s. 28.

22 Vict. No. 19, s. 30.

45. If, in either of the cases aforesaid, the arbitrators shall refuse or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, it shall be lawful for any Judge of the Supreme Court on the application of either party to such arbitration to appoint an umpire; and the decision of such umpire, on the matters on which the arbitrators shall differ, or which shall be referred to him shall, except as hereinafter provided, be final.

In case of death of single arbitrator the matter not to be begun *de novo*.

8 Vict. c. 18, s. 29.

22 Vict. No. 19, s. 31.

46. If, when a single arbitrator shall have been appointed, such arbitrator shall die, or become incapable to act before he shall have made his award, or shall refuse, or for fourteen days neglect to act, the matters referred to him shall be determined by arbitration under the provisions of this Act in the same manner as if such arbitrator had not been appointed.

Where one arbitrator may proceed *ex parte*.

8 Vict. c. 18, s. 30.

22 Vict. No. 19, s. 32.

47. If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse, or for fourteen days neglect to act, and where no substituted arbitrator shall have been appointed under section forty-three hereof, the other arbitrator may proceed alone; and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

If arbitrators fail to make their award within twenty-one days the matter to go to the umpire.

48. If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after 8 Vict. c. 18, s. 31. 22 Vict. No. 19, s. 33.

the day on which the last of such arbitrators shall 51 Vict. No. 37.  
 have been appointed, or within such extended time (if  
 any), not being greater in the whole than six months,  
 as shall have been appointed for that purpose by both  
 of such arbitrators, under their hands, the matters  
 referred to them shall be determined by the umpire  
 appointed as aforesaid.

49. The said arbitrators or their umpire may call Power of arbitrators to call for books, &c.  
 for the production of any document in the possession 8 Vict. c. 18, s. 32.  
 or power of either party which they or he may think 22 Vict. No. 19, s. 34.  
 necessary for determining the question in dispute;  
 and may examine the parties or their witnesses on  
 oath, and administer the oaths necessary for that  
 purpose.

50. Before any arbitrator or umpire shall enter Arbitrator or umpire to make a declaration.  
 into the consideration of any matters referred to him, 8 Vict. c. 18, s. 33.  
 he shall, in the presence of a Justice of the Peace, 22 Vict. No. 19, s. 35.  
 make and subscribe the following declaration, that is  
 to say :—

I do solemnly and sincerely declare that I  
 have no interest, either directly or indirectly,  
 in the property in question, and that I will  
 faithfully and honestly, and to the best of  
 my skill and ability, hear and determine the  
 matters referred to me under the provisions  
 of the "Public Works Act of 1888." A.B.

Made and subscribed in the presence of



**51 Vict. No. 37.** Such declaration shall be annexed to the award when made, and if any arbitrator or umpire having made such declaration shall wilfully act contrary thereto he shall be guilty of a misdemeanour.

**Cost of arbitration how to be borne.**

**8 Vict. c. 18, s. 34.**

**22 Vict. No. 19, s. 36.**

**51.** (I) All the costs of and incident to any such arbitration as settled by the arbitrators shall be borne by the constructing authority, unless the sum awarded by the arbitrators shall be the same or a less sum than shall have been offered by the constructing authority, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

(II) If the sum awarded shall be one-third less than the amount claimed, the whole costs of and incident to the arbitration and award shall be borne by the claimant, and the arbitrators shall direct the payment of the same accordingly.

(III) If either party be dissatisfied with the costs allowed by the arbitrators as aforesaid, the costs may be taxed by the prothonotary or other proper officer of the Supreme Court, and the amount allowed by such officer shall be the amount to be paid.

**Award to be delivered to the constructing authority.**

**8 Vict. c. 18, s. 35.**

**22 Vict. No. 19, s. 37.**

**52.** The arbitrators shall deliver their award in writing to the constructing authority, who shall retain the same, and shall forthwith, on demand, furnish a copy thereof to the other party; and shall at all times, on demand, produce the said award, and allow the

same to be inspected or examined by such party or 51 Vict. No. 37.  
any person appointed by him for that purpose.

**53.** The submission to any such arbitration may, Submission may be made a rule of Court.  
on the application of either of the parties, be made a 8 Vict. c. 18, s. 36.  
rule of the Supreme Court. 22 Vict. No. 19, s. 38.

**54.** No award made with respect to any question Award not void through error in form.  
referred to arbitration under the provisions of this 8 Vict. c. 18, s. 37.  
Act shall be set aside for irregularity or error in matter 22 Vict. No. 19, s. 39.  
of form.

**55.** In any case where reference shall be made to Power to refer award back.  
arbitration as aforesaid the Supreme Court or a Judge 22 Vict. No. 19, s. 40.  
thereof shall have power at any time and from time  
to time, to remit the matters referred or any or either  
of them to the re-consideration and re-determination  
of the said arbitrators or umpire as the case may be,  
upon such terms, as to costs and otherwise, as to the  
said Court or Judge may seem proper.

**56.** If the compensation awarded by the arbitrators Questions of compensation in certain cases to be decided by jury.  
shall exceed the sum of three hundred pounds, and 22 Vict. No. 19, s. 41.  
either party shall be dissatisfied with the award and  
shall desire to have the compensation settled by a jury,  
and shall, within fourteen days after the making of  
the award and notice thereof, signify such desire by  
notice in writing to the other party, then no steps  
shall be taken to enforce performance of the award,  
but the party claiming compensation shall proceed  
by action in the Supreme Court, in the usual manner,

51 Vict. No. 37. to recover from the constructing authority the compensation to which he may be entitled under the provisions of this Act.

If, upon the trial of the said action, the verdict shall be—

- (I) For a greater sum than the sum previously offered by the constructing authority and awarded by the arbitrators ;

All the costs of the said action and of the arbitration and award shall be borne by the said constructing authority.

- (II) For a less sum than the sum so awarded ;

All the costs of the said action and of the arbitration and award shall be borne by the claimant.

- (III) For the sum awarded by the arbitrators ;

All the costs of the said action and of the arbitration and award shall be paid by the party requiring the same to be referred to a jury.

In every such case the costs of the arbitration and award shall be added to, and be recoverable as, the costs of the action.

Compensation  
to absent  
parties to be  
determined  
by a surveyor  
appointed by  
two Justices.  
8 Vict. c. 18,  
s. 58.  
22 Vict.  
No. 19, s. 42.

**57.** The purchase-money or compensation to be paid for any lands to be purchased or taken by the constructing authority from any party who, by reason of absence from the colony, is prevented from treating, or who cannot after diligent inquiry be found, and the compensation to be paid for any permanent injury

to such lands, shall be such as shall be determined by 51 Vict. No. 37.  
the valuation of a competent surveyor and valuator  
nominated for that purpose as hereinafter mentioned.

**58.** Upon application by the constructing authority Two Justices to nominate a surveyor.  
to two Justices, and upon such proof as shall be satis-  
factory to them that any such party is, by reason of 8 Vict. c. 18, s. 50.  
absence from the colony, prevented from treating, or 22 Vict. No. 19, s. 43.  
cannot after diligent inquiry be found, such Justices  
shall, by writing under their hands, nominate a com-  
petent surveyor and valuator, for determining such  
compensation, who shall determine the same accord-  
ingly and shall annex to his valuation a declaration in  
writing subscribed by him of the correctness thereof.

**59.** Before such surveyor and valuator shall enter Surveyor to make a declaration.  
upon the duty of making such valuation, as aforesaid,  
he shall, in the presence of such Justices or one of 8 Vict. c. 18, s. 60.  
them, make and subscribe the following declaration at 22 Vict. No. 19, s. 44.  
the foot of such nomination, that is to say :—

I A.B. do solemnly and sincerely declare that I  
have no interest, directly or indirectly, in  
the property in question, and that I will  
faithfully, impartially, and honestly, accord-  
ing to the best of my skill and ability,  
execute the duty of making the valuation  
hereby referred to me.

Made and prescribed in the }  
presence of }

A.B.

**51 Vict. No. 37.** And if any such surveyor shall corruptly make such declaration, or, having made such declaration, shall wilfully act contrary thereto, he shall be guilty of a misdemeanour.

Valuations to be delivered to constructing authority.

8 Vict. c. 18, s. 61.

22 Vict.

No. 19, s. 44.

**60.** The said nomination and declaration shall be annexed to the valuation to be made by such surveyor and valuator; and shall be delivered to the constructing authority to be kept for the purpose and in the manner hereinbefore provided in case of awards.

Expenses to be borne by constructing authority.

**61.** All the expenses of and incident to every such valuation shall be borne by the constructing authority.

In the Supreme Court of }  
New South Wales. }

Rule. I.

# REGULÆ GENERALES.

FRIDAY, THE 24TH DAY OF MARCH, 1893.

IN pursuance of the powers vested in us by the provisions of the Act 55 Victoria No. 32, we do order and direct in manner following :—

I. Where any cause or matter, or any question or issue of fact arising therein is, under the provisions of section 12 of 55 Victoria No. 32, referred to an arbitrator or referee, he may, subject to the order of the Court or a Judge, hold the trial at, or adjourn it to any place he may deem most convenient, and have any inspection or view which he may deem expedient for the better disposal of the controversy before him. He shall, where practicable, proceed with the trial *de die in diem*, in a similar manner as in actions tried before a Judge and jury.

An arbitrator under a voluntary reference has similar powers and ought to follow the mode of proceeding at *nisi prius*. If in rejecting the evidence of a competent witness, or receiving the evidence of an incompetent witness, a substantial injustice has

Rules I.-IV.

been brought about, the award will be set aside. [*Scott v. Van Sandan*; *Hagger v. Baker*.] The arbitrator must receive all pertinent and material evidence offered. [*Johnstone v. Cheape*; *Samuel v. Cooper*; *Hart v. Duke*.] The arbitrator ought to make a complete note of the evidence and the proceedings before him.

II. Before proceeding with the hearing, the arbitrator or referee shall give to the parties not less than one week's notice in writing of the time and place thereof, and may, on the application of either party, extend the time for hearing if he see fit.

Service is regulated by rule 15.

III. In the event of either of the parties not appearing after service of the notice required by these Rules, the arbitrator or referee may proceed *ex parte*.

The notice ought to state the intention to proceed *ex parte*. [*Tryer v. Shaw*.]

Special circumstances will justify the arbitrator in proceeding *ex parte*. [*Waller v. King*.]

IV. The arbitrator or referee shall have power to administer oaths to, or take the affirmations of, the parties and witnesses appearing; and every such hearing shall be conducted in the same manner as nearly as circumstances will admit as trials are conducted before a Judge and jury.

This authority is included in every submission unless expressly excluded.

V. The arbitrator or referee shall have power to Rules V.-VIII. direct a nonsuit of the plaintiff, to find a general verdict, to determine such issues, or to answer such questions as the Court or a Judge may direct.

If the reference be to an expert, he may decide without hearing evidence. [*Bottomley v. Amber ; Re Maunder.*]

VI. The arbitrator or referee may state a case for the opinion of the Court or a Judge upon any point of law arising out of any facts found by him upon the hearing of the reference.

If the arbitrator is acting irregularly or has taken a mistaken view on the admissibility or otherwise of important evidence, an application should be made for leave to revoke the submission. [*Kirk v. The East and West India Dock Company ; Hart v. Duke.*]

VII. Upon the appointment of the arbitrator or referee, the Court or a Judge may order payment, within a specified time, by each of the parties, into the hands of the Prothonotary of such a sum of money as the Court or a Judge may deem sufficient as a deposit for the remuneration of such arbitrator or referee.

This can only apply to appointments made under s. 12. References under Order of Court.

VIII. The arbitrator or referee shall make his report or award within the time named by the order of reference, or within such extended time as the Court or a Judge may direct.

See c, s. 2.



Rules  
IX.-XII.

IX. The arbitrator or referee shall within one week of making his report or award transmit the same under sealed envelope to the Prothonotary, and shall at the same time send notice thereof to the parties.

The arbitrator is bound to inform the parties of the closing of the case. [*Peterson v. Ayre.*]

X. The arbitrator or referee shall, when so transmitting his report or award, also send under separate cover to the Prothonotary a statement showing exactly the time occupied and the amount expended by him in connection with the hearing of the matter so referred.

In England where official referees are attached to the Supreme Court, the rate of payment is equal to £5 for every reference, and if reference lasts over two days, about £3 a day for every subsequent day, with hotel and travelling expenses.

XI. The Prothonotary shall forthwith bring the said statement before the Court or a Judge, and so soon as the Court or a Judge shall have determined the amount of remuneration to be paid to the arbitrator or referee, the Prothonotary shall inform the parties thereof.

This course rendered necessary by wording of s. 13 (iii).

XII. Upon payment by the parties, or either of them, of any amount that may be determined by the Court or a Judge as payable to the arbitrator or referee in excess of the sum deposited under Rule 7, the

envelope containing the report or reward shall be opened by the Prothonotary, who shall give notice thereof to the parties. Rules  
XII.-XIV.

This can only apply to appointments made under s. 12. An arbitrator has a lien on the submission and award; he can withhold the notes of evidence taken, although he has no lien on documents given in evidence. [*Roberts v. Eberhardt, Re Coombs.*] As to arbitrators' charges and right to recover payment. [*Deane v. Nicol & Another; Morell v. Dixson; Poole v. Dixson & Another; McSharry v. Commissioner of Railways; Hoggins v. Gordon; Crampton & Holt v. Ridley & Co.*]

XIII. After receipt of the notice in the last Rule mentioned, either party may move the Court or a Judge to direct that a verdict may be entered in accordance with the finding of the arbitrator or referee, or that such order may be made as to the Court or a Judge may seem fit.

This application ought to be on notice to the other side.

XIV. If either party be dissatisfied with the report or award of the arbitrator or referee, he shall, within fourteen days from service of the notice mentioned in Rule 12, move the Court or a Judge for a rule *nisi* to show cause why the report or award should not be set aside, referred back, or amended, and the grounds upon which the rule *nisi* is asked for shall be set forth in an affidavit upon which the motion shall be made.

E

**Rules**  
**XIV.-XVI.**

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The award must be the joint judgment of the arbitrators (if two or more), must be final, certain, possible, reasonable, consistent and legal. [*Nichols v. Hancock* ; *Thursby v. Helbart* ; *Lewis v. Rossiter* ; *Booth v. Davis* ; *Turner v. Swainson*.]

Several awards may be made if authorised by the submission. [*Wrighton v. Bywater*]

XV. All notices to be given under these Rules may be served upon the solicitor of a party, or if not represented by a solicitor they may be left at the address which a plaintiff or defendant is required to give in compliance with the Rule of Court relating to plaintiffs and defendants appearing in person.

See s. 26, C.L.P. Act, 1853.

XVI. Whenever the practice shall not be provided for by these Rules, then the practice of the Supreme Court in its Common Law Jurisdiction shall be followed so far as applicable.

FREDK. M. DARLEY, C.J.  
W. C. WINDEYER, J.  
J. GEO. LONG INNES, J.  
M. H. STEPHEN, J.  
WM. OWEN, J.  
W. J. FOSTER, J.  
C. J. MANNING, J.

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